IN THE

Supreme Court of the United States

---------- TERM, 1925.

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v.

H. L. KIRTLEY, H. W. HEROLD, and F. E. CAWLEY, *Appellees.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR THE APPELLANTS.

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STATEMENT.

This is a suit in equity instituted in the District Court of the United States for the Southern District of West Virginia, in the month of June, 1923, in which John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer and W. B. Stephenson are plaintiffs and H. L. Kirtley, H. W. Herold and F. E. Cawley are defendants.

The object and purpose of this suit is to have set aside, cancelled and annulled certain decrees of the Circuit Court of Nicholas County, West Virginia, entered in that court on February 25, 1921, and on May 20, 1921, and a deed, in pursuance of said last named decree, made by special commissioners, Brown, Wolverton and Ayers, to the defendants Kirtley and Herold.

The plaintiffs are all non-residents of the State of West Virginia, and they, except W. B. Stephenson, are the joint owners of a one undivided fourth interest in certain lands in said Nicholas County in the Southern District of West Virginia, containing in the aggregate more than 5,000 acres, and those four plaintiffs who own said interest hold the same in the following proportions: J. W. Stephenson 3/48 of the whole, Emma Thomson 5/48 thereof, Jennie Stephenson 2/48 thereof, and Mary S. Weimer 2/48 thereof. This one-fourth interest in said lands was originally acquired by plaintiff W. B. Stephenson, with funds belonging to himself and his five brothers and sisters, who, in acquiring the same, was acting for himself and his five brothers and sisters, four of whom are the four plaintiffs first named above. W. B. Stephenson, instead of taking title to said one-fourth interest jointly in the name of himself and his five brothers and sisters, took the legal title in his own name, whereas the deeds conveying said lands should have named John W. Stephenson, Emma Thomson, Jennie Stephenson, Mary S. Weimer, then Mary R. Stephenson, W. B. Stephenson and Catherine J. Stephenson as grantees, each taking one-sixth of the one-fourth interest in said lands.

Shortly after W. B. Stephenson so took the title in his own name he, on December 31, 1902, executed and delivered to his said brothers and sisters named above a

declaration of trust which discloses the uses to which he held such title and the real interests of the plaintiffs as the same then were and as herein stated (R. 18).

Later plaintiffs J. W. Stephenson and Emma Thomson purchased from their sister Catherine J. Stephenson her one-sixth of the one-fourth interest in said lands, and afterwards, on February 26, 1908, W. B. Stephenson executed a deed whereby he conveyed to plaintiff Jennie Stephenson the one-sixth of said undivided one-fourth, to Mary S. Weimer one-sixth of said one-fourth, to John W. Stephenson three-twelfths of said one-fourth, and to Emma Thomson three-twelfths of said one-fourth, leaving in himself one-sixth of said one-fourth (R. 21). Later plaintiff Emma Thomson purchased from W. B. Stephenson his interest in said lands, and by deed dated January 12, 1911, he conveyed such interest to her (R. 23).

The plaintiff W. B. Stephenson was, during the time of the several transactions aforesaid, and still is a citizen and resident of the State of Pennsylvania.

In the year 1915, in a suit previously instituted in the Court of Common Pleas for Clearfield county, Pennsylvania, the defendant F. E. Cawley, a citizen and resident of the State of Massachusetts, recovered a judgment against said W. B. Stephenson and by assignment to him became the owner of three other judgments against said W. B. Stephenson, recovered in the same court.

In February, 1920, the defendant F. E. Cawley instituted, in the Circuit Court of Nicholas County, West Virginia, a suit in equity naming as defendants the plaintiffs in this cause. The bill filed by Cawley in that suit (R. 28) charges that the two deeds of February 28, 1908, and January 12, 1911, were executed by W. B. Stephenson for the purpose of hindering, delaying and defrauding

creditors and especially the plaintiff to that bill, and prayed that the same be set aside and cancelled.

In Cawley's suit in the Circuit Court of Nicholas County jurisdiction rests upon substituted service of process by order of publication (R. 27), supplemented by an affidavit for an order of attachment (R. 33), and order of attachment (R. 34).

The order of publication in the caption thereof and in styling the case contains the name of Emma *Thomas* as a defendant instead of Emma Thomson, which was doubtless intended (R. 27). There is no evidence in the record of the posting of the order of publication; the affidavit for the order of attachment is insufficient; and the order of attachment does not direct or authorize its levy upon the property or estate of either of the plaintiffs who then owned and held the title to said interest in said lands, but directs the attaching of the estate of plaintiff W. B. Stephenson who had before that time divested himself of all right or title to the lands in question.

A decree (R. 36) was rendered in said cause by the Judge of the Circuit Court of Nicholas County upon the bill and exhibits alone and without evidence touching the allegation of fraud, which said decree cancels and annuls the two deeds aforesaid, decrees the said one-fourth interest in said lands to sale to satisfy Cawley's alleged debt against W. B. Stephenson, and grants to the plaintiff in that cause all the relief for which he prays. This decree was entered February 25, 1921, and in pursuance thereof said interest in said lands was sold May 18, 1921; the defendants H. L. Kirtley and H. W. Herold became the purchasers, and by decree entered May 20, 1921, (R. 41) said sale was confirmed and a deed directed to be made to the said purchasers; on May 18, 1923, the commissioners ap-

pointed for the purpose executed and delivered to said purchasers a deed for the said interest in said lands (R. 78). The plaintiffs here had no knowledge of the suit in the Circuit Court of Nicholas County or of the proceedings had therein until more than two years after the entry of the final decree of sale and the decree of confirmation, and under the laws of West Virginia they were not permitted to appear in said suit and defend the same after the expiration of two years from the entry of such final decree.

Being thus deprived of their right to defend their interests in said suit in Nicholas County, these plaintiffs, in July, 1923, commenced this suit in the District Court aforesaid, in which they pray for a cancellation of the said decree of February 25, 1921, the decree of May 20, 1921, and the deed made by special commissioners Brown, Wolverton and Ayers to the defendants Kirtley and Herold dated May 18, 1923, and upon motion of the defendants herein this cause was, by the judge of said District Court, dismissed, and the same is now brought here for review.

STATUTES.

Sections 12, 13 and 14 of chapter 124, Barnes' Code of West Virginia, on the subject of orders of publication, read as follows:

> "§12. Every order of publication shall state briefly the object of the suit, and require the defendant against whom it is entered or the unknown parties to appear within one month after the date of the first publication thereof, and do what is necessary to protect their interests. It shall be published once a week for four successive weeks

in some newspaper published in the county in which the order is made or directed, if one is so published, to be designated by the party directing such order or his attorney, but if no paper be so designated, then in such paper as the circuit court may direct, or if the court make no direction, then as the clerk of the circuit court may prescribe; and if no newspaper be published in the county, then in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct. It shall be deemed to have been published on the day of the fourth publication thereof. It shall be posted at the door of the court house of the county in which the court is held at least twenty days before the judgment or decree is rendered."

"§13. When such order shall have been so posted and published, if the defendants against whom it is entered, or the unknown parties, shall not appear at the next term of the court, after such publication is completed, the case may be tried or heard as to them. Personal service of a summons, *scire facias,* or notice may be made on a non-resident defendant out of this state, which service shall have the same effect, and no other, as an order of publication, duly posted and published against him. In such case the return must be made under oath, and must show the time and place of such service, and that the defendant so served is a non-resident of this state. Upon any trial or hearing under this section, such judgment, decree or order shall be entered as may appear just."

"§14. Any unknown party or other defendant,

who was not served with process in this state, and did not appear in the case before the date of such judgment, decree or order, or the representative of such, may, within two years from that date, if he be not served with a copy of such judgment, decree or order more than one year before the end of said two years, and if he was so served, then within one year from the time of such service, file his petition to have the proceedings reheard in the manner and form provided by section twenty-five of chapter one hundred and six of the code, and not otherwise; and all the provisions of that section are hereby made applicable to proceedings under this section. Provided that if such judgment or decree was made before this section as amended takes effect such petition may be filed within the time prescribed by law at the time such judgment was rendered or decree pronounced."

ARGUMENT.

The Circuit Court of Nicholas County, West Virginia, did not have or acquire jurisdiction of the defendants to the suit of F. E. Cawley against the plaintiffs here, or of the property and estate of said defendants decreed in that cause to be sold and therein sold, for the following reasons:

POSTING.

First. There was no completed substituted service of process as to the said defendants. True, there was an order of publication styled "F. E. Cawley, plaintiff, v. W. B. Stephenson, Emma *Thomas,* Jennie Stephenson, Mary S. Weimer and John W. Stephenson," published in a weekly newspaper published in Nicholas County, for four

successive weeks, and that fact is certified and attested by the editor and publisher of said paper (R. 27). But it does not appear in this publisher's certificate or elsewhere that any such notice was ever posted at the door of the court house of said Nicholas County. And it is here asserted that the posting of a notice of publication under the West Virginia statute is just as important and just as mandatory as the publication of such an order, and without such posting there is no substituted service. In the case of McCoy's Executors v. McCoy's Devisees, 9 W. Va. 443, it is said:

> "No decree should be rendered affecting the interest of an absent defendant unless it appear (if it be not otherwise brought before the court) that he has been regularly proceeded against by an order of publication duly published in the newspaper and posted at the front door of the court house."

The case of Coal River Navigation Co. v. William H. Webb, 3 W. Va. 438, discusses this same question, and point 4 of the syllabus reads as follows:

> "A mere recital in a decree that an order of publication was returned 'duly executed by publication in a newspaper,' &c, would not be sufficient in itself to establish it, if nothing else appeared in the papers of the cause to show how it had been executed."

Beginning on page 443 of the report just cited, and reading there and on page 444, we find the following comment by the Supreme Court of Appeals of West Virginia:

> "An objection is also urged by the appellants as

to the proof of the proper execution of the order of publication, as well as to its regularity and validity. The decree complained of recites that the order of publication as to certain non-resident defendants was returned 'duly executed by publication in the Kanawha Valley Star, a newspaper in Kanawha county, Virginia, for four successive weeks, commencing on the 13th day of August, 1860.'

If this were all the evidence in the record of the due execution of said order, it would be clearly insufficient, as it does not show a compliance with the statutory provision which then required that a copy of such order should also have been posted at the front door of the court house of the county of Kanawha, on the first day of the next county court after the order was entered.

But by an affidavit of the publisher of said paper found in the record it appears that the order was duly published in the paper, as recited in the decree, and also that a copy of the same was posted by the said appellant, at the front door of said court-house, on the first day of the next county court of said county after the order was entered. If there was no other objection to the order, therefore, there would, as I think, be no error in the decree, so far as it is founded on it, notwithstanding the recital therein, as to the due execution of the order, would be insufficient in itself to establish it."

The subject of substituted service by order of publication was again before the Supreme Court of Appeals of

West Virginia in the case of Styles v. Laurel Fork Oil and Coal Co., et al., 45 W. Va. 374, and points 2 and 3 of the syllabus in that case read as follows:

> "Where it does not appear from the record whether process was duly served, or order of publication duly published and posted, or not, except from the decree, which declares that 'process was duly served' or 'order of publication was duly executed as to the defendants,' it will be presumed that it was so served or executed."
>
> "But when the record shows the process or order of publication, and shows clearly that process was not served or order of publication executed as to any particular defendant, such declaration in the decree will not raise such presumption as to such defendant."

It is true that the decree of sale (R. 36) contains a recital to the effect that the cause came on "to be heard upon the order of publication duly executed as to the defendants who are non-residents and have been regularly proceeded against as such." But when we look to the record of the case in the Nicholas Circuit Court, every part and parcel of which is now before this court, we find that there is no evidence even purporting to show that this order of publication was ever posted, although it clearly appears that the same was published in a newspaper, and hence the recital in said decree does not raise the presumption that there was such posting.

In the cases of Laflin v. Gato and Murphy v. Gato, heard together by the Supreme Court of the State of Florida, reported in 42 So. 387, it is held that in construc-

the service by order of publication the certificate of the clerk should show the posting of a copy of the order at the door of the court house and that the fact of such posting should affirmatively appear from the record. The court said:

> "It does not appear that the clerk posted a copy of the order at the door of the court house."

Under the statutes of Alabama providing the manner by which absent defendants may be brought before a court of equity, publication is required to be made on the court house door as well as in a newspaper, and if such posting be omitted a decree cannot be sustained. In the case of Batre, et al v. Auze's Heirs, 5 Ala. 173, upon this subject, the court said:

> "It will be seen that there was no personal service of the subpoena on him, and he is attempted to be brought before the court as a non-resident defendant. The service is defective because it does not appear that any publication was made on the court house door as the statute requires as well as in a newspaper."

In the State of Mississippi the lands of a non-resident defendant may be proceeded against by his creditors only in the mode pointed out by statute and where a case goes to hearing upon proof of order of publication in the newspaper it is held that the bill should be dismissed for want of proof of proper publication, the statute requiring that notice should be posted at the door of the court house.

In the case of Zecharie v. Bowers, 11 Miss. 641, the court says:

> "The statute requires, in express terms, that 'there shall be a copy of the order posted at the front door of the court house' besides a publication in some public newspaper. It is the uniform and unbroken course of the decisions, that under all statutes which authorize the substitution of some other means for personal service of process as a foundation for the jurisdiction of the court, the most exact compliance with these requisitions will be enforced."

To the same effect is the case of McKey v. Cobb, et al, 33 Miss. 533.

It seems that in the State of Florida that as a part of substituted service a copy of the process sha'l be mailed by the clerk to the non-resident defendants. In the case of Wylly v. Sanford Loan Co., 33 So. 453, two non-resident defendants were proceeded against. It appeared from the record that the clerk's certificate showed that "a copy had been mailed to the defendant." There being two defendants the court held that the certificate of the clerk, at best, showed service upon only one of the defendants and the uncertainty as to which of them was so served, rendered a decree based thereon *prima facie* void as to both defendants.

The case of Storde v. Storde, decided by the Supreme Court of the State of Idaho, in 1898, and reported in 52 Pac. 161, is a well considered case on this subject. This case holds that all the requirements of the statute authorizing service of summons by publication must be complied with to give the court jurisdiction, and that when the record fails to show that a copy of the summons was sent to the address of the defendant, where the order directs that it be sent, service by publication is not com-

plete and does not give the court jurisdiction. It was held that unless affidavits are filed showing that all the requirements of the statute authorizing service by publication have been complied with the court has no jurisdiction to enter the judgment.

> "The decree," it is said by the court, "recites that the defendant had been duly served with the original summons," etc. "The record shows that the original summons was placed in the hands of the sheriff" and returned not found. "The record contains the affidavit of the publisher of the newspaper * * * wherein he stated that the summons was published, etc. The record fails to show that a copy of the summons and complaint was sent to the defendant as required by said order of publication."
>
> "In this case, the judgment roll in the other case was introduced in evidence and it contains no proof of the service of summons by publication or otherwise, and the evidence shows as a matter of fact no service by publication was made. This being true the court had no jurisdiction and the decree therein was absolutely void for want of jurisdiction."
>
> "The rule in service by publication seems to be that the record must show essentially all the jurisdictional facts. It follows, therefore, that the record in this case should have affirmatively shown a compliance with the statutory provisions relating to forwarding the process by mail. This it failed to do and the omission is fatal to the jurisdiction of the court below."

This case is one of collateral attack—very similar to the case at bar, and holds that despite the recital in the decree, the evidence in the record will suffice to show a failure of service by publication in accordance with the statutory requirements.

IDEM SONANS

The order of publication in the instant case is defective because in the caption thereto appears the name of Emma *Thomas*, whereas the name of one of the defendants to that suit, who is one of the plaintiffs to this suit, is Emma *Thomson*. It may be contended that this objection is not well taken under the recognized doctrine of *idem sonans*. But our view of it is otherwise.

> "Since the method of obtaining jurisdiction over one's personal property in an action commenced by a substituted or constructive service of process is exceptional and in derogation of any common law method of procedure, some courts take the position that no presumption in order to make good the service should be indulged that are not strictly and clearly warranted by the law sanctioning such practice and that if the service of process is made under the wrong name the service will not be validated by a resort to the doctrine of *idem sonans.*"
>
> 19 R. C. L., p. 1335.

In Schoenfeld v. Broune, et al., 159 Mich. 139, 123 N. W. 537, it was held that a published notice to "Dunton" is not sufficient to support an attachment on a property against Denton although a co-defendant was personally named, if no personal service was secured on either. Wherein it was said by the court, quoting Campbell J. in Granger v. Superior Court Judge (Mich.), 6 N. W. 848,

> "Where cases and proceedings are not according to the usual course and are special in character they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction the doctrine prevails that proceedings not conforming to statutes are void; but this is on the ground that there has been no service whatever and that the party, therefore, has not been notified in any proper way of anything."

It is further said, quoting Champlin, J., in Steere v. Vanderberg (Mich.), 35 N. W. 110,

> "It is a settled rule that all exceptional methods of obtaining jurisdiction over persons not found within the state must be confined to the cases and exercised in the way precisely indicated by the statute; and it may also be regarded as settled law that a failure to comply with the statutory requirements, where the jurisdiction conferred is special and no personal service obtained, renders the judgment null and void."

The court further says, following the language in Fanning v. Krapfi (Ia.), 14 N. W. 727, 16 N. W. 293, that

> "The question before us concerns the title to real estate and it would not be possible to base any safe rule upon the distinction between names that are peculiar and those that are not peculiar. Notice by publication even where there is no misnomer does not afford a very strong natural presumption that the fact of the pendency of the action will be

> brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires. Whoever undertakes to give notice by publication and misnames the defendant is without excuse. It requires very little care to publish the defendant's name correctly. We are evidently justified in holding the plaintiff who gives notice by publication to a considerable degree of strictness. * * * It appears to us that we should not open the door to mischief of which no one could see the end."

It is concluded in the case of Schoenfeld v. Broune, *supra*, that in an attachment case against Benjamin W. Bourne and William H. Denton, non-residents, where no one is personally served with process, the court does not get jurisdiction because of the publication of a notice describing the defendants as Benjamin W. Bourne and William H. *Dunton*.

The same view is taken in Steinman v. Jessee, 108 Va. 567, 62 S. E. 275, wherein the appellant was proceeded against only by order of publication, the notice of which as published gave his name as "A. J. Stainmau." In this case the court said:

> "In order to bind appellant by its decrees the proceedings against him by publication must have been strictly in compliance with the statute authorizing notice by publication. Such a notice being constructive only, in the order of publication as well as the statute authorizing it on prescribed conditions, is to be strictly construed. Unquestion-

> ably the doctrine of *idem sonans* may be invoked to cure immaterial variations in the spelling of the name but the court agrees that the spelling of the name and syllables must produce the same sound as the name. To apply the doctrine in this case where, in the *caption* of the order of publication the name is spelled 'Stainmau', *which is the notice,* while in that part of the publication regarded as the warning the name is spelled 'Stinman' and hold that the appellant should have understood that 'Steinman' was meant, would be not only to carry the doctrine beyond any authority cited or that we have been able to find, but beyond sound reason."

That the initials of the christian name of the party are correctly printed is of no importance except as a matter of secondary consideration, since the attention of one reading the notice, perchance it might be, would not be attracted by the initials of the christian name but by the surname and less common name used in the majority of cases than the initials of a christian name.

Other cases wherein it was held not to be *idem sonans* follow:

Robert Mc*R*ee for Mc*K*ee, in McKee v. Brown, 45 Tex. 546, where it was held that the court should indulge in no presumption not strictly and clearly warranted by the record in support of judgment against non-resident on constructive service.

Martha He*dr*ick for Martha He*lm*ick, in Collins v. Reger, 62 W. Va. 195, wherein it was held that the rule of

idem sonans was inapplicable to assessment rolls or to delinquent and sales records.

Hoonbrook for Hornbrook, in Male v. Moore, 70 W. Va. 448, in the case of an erroneous assessment of property.

Herberling for Heberling, in the case of Heberling v. Moudy (Mo.), 154 S. W. 65, wherein the court observed that the names were not *idem sonans,* were not of common derivation nor was there any evidence that one was a corruption of the other in general use.

J. A. Myer for J. A. Myers, in Myers v. DeLisle (Mo.), 168 S. W. 676, wherein the tax suit notice was held insufficient.

Kitie A. Viger for Katie A. Viger, in Miller v. Keaton (Mo.), 139 S. W. 158.

Chase Marker for Chan Marker, in Schaller v. Marker (Ia.), 114 N. W. 43.

Second. The Circuit Court of Nicholas County did not acquire jurisdiction of this cause of action, for the reason that the affidavit for the attachment is insufficient and void, and there being no other basis for the suit in Nicholas County, the court's jurisdiction never attached to the cause of action. The affidavit for the order of attachment was made by one of the attorneys for the plaintiff bringing the suit. The affidavit states that the plaintiff has a claim arising out of contract amounting to a certain sum against one of the defendants, and that the suit is brought for the purpose of recovering that claim. It then recites that the plaintiff and certain other people recovered judgments against one of the defendants in that suit for certain amounts, and that all of these judgments

have become the property of the plaintiff in that suit, and amount to a certain sum of money. But nowhere does the affidavit show that the suit is brought to recover on the cause of action shown by these judgments. It is not alleged in the affidavit or stated that the judgments constitute the cause of action upon which the attachment is based. This being true the affidavit does not anywhere state the nature of the plaintiff's claim, and without a complete statement of the nature of the plaintiff's claim the affidavit is void. In Demming National Bank v. Baker, 83 W. Va. 429, an attachment was brought upon a negotiable promissory note in an attempt to reach the property of an endorser who was a non-resident of the state. The affidavit described the note, alleged that the defendant was an endorser thereon and that the same had been duly protested. The court held the affidavit insufficient in that it failed to state that notice of the dishonor of the note had been given to the endorser; quashed the attachment and dismissed the suit. This case is enlightening for the reason that it announces the doctrine which had been frequently before announced that the statute conferring the right of attachment must be strictly construed, and that while the term "protest" ordinarily means the taking of all of the steps necessary to fix liability upon the endorser of a negotiable note, still when used in an attachment affidavit it can not be held necessarily to include the giving of notice of dishonor.

In the case of Citizens National Bank v. Dixon, 94 W. Va. 21, the court held a notice of motion for judgment insufficient because it did not appear unequivocally therein what connection one of the defendants had with the note described; and the same is true in the case of Pelley v. Hibner, 93 W. Va. 169.

It must be borne in mind that the rule controlling the sufficiency of a notice of motion for judgment is very much more liberal than that applying in the case of an attachment affidavit, and that still under this more liberal rule in these two cases the court would not allow anything to be supplied by inference; and if no omission can be supplied by inference in a notice of motion for judgment where the rule is that only substantial accuracy must prevail, still for a stronger reason can no inference be appealed to in the case of an attachment affidavit to show the correlation of the matter therein contained. It may be argued, however, that even though the attachment affidavit be void for the reasons aforesaid, still the court had jurisdiction in this case upon the ground of the alleged fraudulent transfer of the property.

It is quite true that the court has general jurisdiction of causes of action of this class, but before this jurisdiction can be exercised it must be attached in some way to the particular cause of action. This may be done by service of process upon the parties to be affected, in which case complete jurisdiction is given over their persons, or if this is not possible it may be done by attaching jurisdiction to the subject matter to be affected, as by an attachment where there is already no existing lien. But unless the jurisdiction of the court becomes attached to the cause of action in one of these two ways jurisdiction is never acquired. If the claim attempted to be asserted is already a lien against the particular property sought to be affected, then by virtue of that lien the jurisdiction can be attached to the property. If, however, a claim sought to be asserted is not a lien upon the property which it is attempted to affect, then it must be attached to that property by some sort of lien, and in this case that was attempted to be done by an attachment.

The cases relied upon in the court below to sustain the jurisdiction of the court regardless of the attachment are not apt for that purpose, for it appears that in the case of Goshorn v. Snodgrass, 17 W. Va. 717, and Watkins v. Wortman, 19 W. Va. 78, jurisdiction was had over the persons of the defendants to be affected. In each of these cases answers were filed and the matters contested, so that regardless of the attachment the court had jurisdiction of the parties whose interests were involved in the litigation.

And in the case of Danser v. Mallonee, 77 W. Va. 26, the court held that while the attachment was invalid it was not proper for the court below to dismiss the suit upon quashing the attachment, but that he should have allowed another attachment to be sued out or the plaintiffs to obtain process against the defendant. In other words, the holding simply was that while the court had not yet obtained jurisdcition of the cause it might have done so, and the plaintiffs should have been given an opportunity to effect that purpose.

Third. The Circuit Court of Nicholas County was without jurisdiction to enter the decrees complained of without personal service upon the defendants and without proof of the allegations of the fraudulent transfer of the land as charged in the bill. Even though the court had jurisdiction of the cause of action, which is of course denied, it did not have jurisdiction to enter the decree of sale at the time it was rendered. In a cause which is being proceeded with *ex parte* as was the case here, the jurisdiction of the court must exist to enter each decree that is rendered, and the things must be done which are necessary to confer jurisdiction as each particular step

is taken. No decree *pro confesso* can be entered upon an order of publication, but the plaintiff must prove his case before the court has any jurisdiction to enter a decree. The decree entered shows that the case was brought on to be heard upon the order of publication, upon the plaintiff's bill and exhibits, upon the affidavit for attachment and the attachment and the levy thereon. There was no proof taken in the case to show that the transfer of the property by the one defendant to his co-defendants was fraudulent; and without a word of proof upon this question the court adjudicated that such was the case. If there had been offered some evidence upon this question, which was the only question in the case, and its sufficiency was denied, of course the determination of the trial court would be final; but where the record affirmatively shows as it does in this case, that no evidence whatever was taken upon the point, then the attempt by the court to enter a decree which was in effect a decree *pro confesso,* is absolutely void, for it did not have any jurisdiction to enter the decree declaring the deeds fraudulent until some evidence was offered to that effect. It was in effect a fraud upon the rights of the defendants for it can not be doubted that if the plaintiff had proceeded to take evidence upon this question the defendants would have become possessed of information of the pendency of the suit and would have come in and made defense thereto.

Section 13, chapter 124, West Virginia Code, copied herein, it will be remembered, says that if the defendants shall not appear *"the case may be tried or heard as to them."* Manifestly a trial or hearing is contemplated, and proof of essential facts required by this statute.

In setting aside the deeds filed as exhibits No. 7 and No. 8 with the plaintiffs' bill, as fraudulent and void, and

decreeing the lands conveyed thereby to sale, without hearing any evidence in support of the said bill was a denial of due process of law to the plaintiffs here, by the Circuit Court of Nicholas County and was in violation of the Fourteenth Amendment to the Constitution of the United States.

> "The judgment of a court which has once acquired jurisdiction is unassailable collaterally only when after acquiring jurisdiction it proceeds according to established modes governing the class to which the particular case belongs. When it transcends, in the extent and character of its judgment, the law applicable to it, its judgment is not erroneous, but void."
>
> Taylor on Due Process of Law, p. 333.

The case of Winston v. McVeigh, 93 U. S. 274, is an *in rem* action in which the premises in controversy had been seized. The owner thereof being a non-resident, process of monition and notice by publication issued by which persons in interest were warned to appear and make allegations in their behalf. The owner appeared by counsel and made answer which on motion was stricken from the file on the ground that the defendant was an alien enemy and had no *locus standi* in that forum. Thereupon the court condemned the property as forfeited, stating that the default of all persons had been duly entered. It was held that under the circumstances the property could not be so forfeited because the defendant was not allowed to appear and make answer. Justice Field speaking for the court sadi:

> "The position of the defendant's counsel is, that, as the proceeding for the confiscation of the prop-

erty was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture and, consequently, had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical seizure did not of itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the

question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges."

The court further says:

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

In the case of Hovey v. Elliott, 167 U. S. 409, it appeared that the trial court obtained jurisdiction of the defendant by proper process, but struck his answer from the files until he should purge himself of contempt. This the defendant failed to do, and the court suppressing his testimony rendered judgment against him. It was held that this judgment was void and could be attacked collaterally. In the opinion cited, the court quoted with approval a definition of "due process" from the Dartmouth College case, which is as follows:

"A law which hears before it condemns, which proceeds upon inquiry and renders judgments *only after trial.* The definition here given is apt and suitable as applied to judicial proceedings which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'"

In the Elliott case the court further said:

> "* * * if the whole process of the court be spent, and the defendant never appears, you can never have a decree, for you can never make any proofs against an absent person who is never brought into contest, and there is no foundation for a decree without confession or proofs."

The case of Parsons v. Russell (1863, Mich.), 83 Am. Dec. 728, involved a statute of the State of Michigan which undertook to provide for a seizure and sale of certain property without proof establishing such claim before a judicial tribunal, and in the case cited such statute was held unconstitutional and as being in conflict with the 'due process of law' provision of the Constitution of the United States. Upon the subject at hand the court in the case just cited uses the following language:

> "This law confers upon a claimant a right to condemn and sell the boat upon his mere assertion of the debt without requiring proof to be made before any judicial tribunal or requiring any judgment to be made after trial or investigation of the demand. Thus a vessel may be sold upon the assertion of the existence of a demand which may be absolutely false and unfounded. He is deprived of his property before trial and judgment. Before property is taken from an individual he is entitled to trial according to the forms of law. Judicial action is, in such cases, imperatively required, and implies and includes *actor, reus, judex*—regular allegations, opportunity to answer and trial according to some settled course of judicial proceedings. And by this is meant an impartial judicial authority after a trial and judgment under general laws."

In the same opinion the court says that to permit a claimant to seize property and have it condemned and sold without proof is tantamount to permitting a person to be the judge in his own case.

The case at bar is very much like the case of Remer v. MacKay, 35 Fed. 86. In that case Remer was indebted to MacKay, and both were citizens of Illinois. Remer's wife obtained title to land in Iowa, and MacKay sued Remer and wife in Iowa by substituted service. The Iowa state court, having determined the allegations of the complaint to be true, rendered judgment directing the sale of the land, which was accordingly sold and conveyed to the purchaser MacKay. Remer, the plaintiff, later purchased the Iowa land from his wife and brought his action in the United States court to set aside the deed to MacKay. The court said:

> "The case made by the bill is not that of two conflicting titles, but that the defendant has attempted to divest Mrs. Remer of her title by judicial proceeding which is void. Under the showing made by this bill the Iowa state court had no jurisdiction over Mrs. Remer in the suit, and its judgment and proceedings did not operate to divest her of her interest in this property. I know of no judicial proceeding where the apparent owner of property can have his title divested and his property applied to the payment of another's debt without personal jurisdiction. This question has been frequently passed upon by the Supreme Court of the United States. Pennoyer v. Neff, 95 U. S. 714. * * * Mrs. Remer, under the line of authorities I have cited, could not be divested of her title without personal service, and having her day in court for the purpose of contesting the question as to whether she

held that in trust or in fraud of the creditors of Adam Remer. Therefore, I have no hesitation in saying that on the case made by the bill, while this debt may be a cloud on the title of Mrs. Remer to the property, she has not been divested of her estate."

In our opinion the point of the absence of proof raised in this case is within the doctrine laid down in many criminal cases where discharges are sought upon writs of habeas corpus for lack of proof before committees and magistrates. It has been held that if the committing magistrate has committed one charged with an offense without hearing any evidence at all, habeas corpus may be resorted to to discharge him, while if a committing magistrate has heard any competent evidence upon the question the court will not inquire into its sufficiency, the theory being that the jurisdiction of the committing magistrate depends upon the existence of competent evidence and presentation of it at the hearing. See *Ex Parte* Samuel, 82 W. Va. 486, and Hyde v. Shine, 199 U. S. 62-84. Of course it is well established, as is indicated in these opinions, that on a writ of habeas corpus if the committing authority has jurisdiction of the offense the accused will not be discharged for mere irregularities in the procedure; but there must not only be jurisdiction of the offense and of the person, but in order to commit for the offense there must be a showing that the offense has been committed. There can not be a commitment without such showing. And so in a case like this, the court must not only have jurisdiction of the cause of action, but it must do those things which are required in order to the entry of a final decree. It can no more enter a decree *pro confesso* in a cause where the defendants are not served with process than it can enter such a decree in a

cause of which it never acquired any jurisdiction in any form. It may have jurisdiction of the cause for the purpose of doing those things necessary to its proper adjudication, but unless it does those things necessary to the proper determination of the cause it cannot enter a decree determining it, for the doing of those things is as much necessary to confer jurisdiction to enter a final decree as the order of publication is in the first instance.

CONCLUSION.

It is confidently and respectfully submitted that due process of law has been denied to these plaintiffs; that the substituted service seeking to bring these parties before the court in the case in the Circuit Court of Nicholas County was so defective that that court did not acquire jurisdiction to hear the plaintiffs' cause; and that even after assuming jurisdiction, that court did not hear the cause in a proper sense; in that case the plaintiff's allegations of fraud could not be taken for confessed, there being absolutely no proof and no evidence sustaining such charge, no case was made out against the defendants, and there was no trial or hearing; and for these reasons and other reasons appearing from the record the bill of these plaintiffs should not have been dismissed by the Judge of the District Court for the Southern District of West Virginia; and therefore, his order so dismissing the same should be reversed.

Respectfully submitted,

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